

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA**

CIVIL APPEAL NO. 027 OF 2014

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ARISING FROM CIVIL SUIT NO. 029/2009

ARISING FROM ADMINISTRATION CAUSE NO. 017/2009

1. NABIRYE SANDRA

2. KAKANU YUSUF GALUBALE :::::::::::::::

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APPELLANTS

VERSUS

1. KIZITO MOSES

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2. KATUMBA PAUL

3. MUDIOPE JANE :::::::::::::::

RESPONDENTS

BEFORE: THE HON. JUSTICE GODFREY NAMUNDI

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JUDGMENT

This Appeal arises from the Judgment of His Worship
25 Amos Kwizera, Chief Magistrate Jinja dated
13/09/2013 in which he dismissed the claim by the
Plaintiffs who are now the Appellants.

The brief background to this matter is that the Plaintiffs/Appellants petitioned Court seeking a grant of Letters of Administration for the Estate of their late father Kakanu Azumafesi Bosco.

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The suit land was listed to form part of the said Estates properly and in protest, the Defendants lodged a Caveat against the grant of the Letters of Administration to the Plaintiffs unless the suit land
10 over which they had a claim was removed from the list of properties listed.

The suit was filed as a result of a Caveat and is seeking Declaratory Orders that the suit property
15 belonged to the late Kakanu and therefore for his part of his Estate. The said suit was dismissed.

The Appellants filed two grounds of Appeal namely:

1) The learned trial Magistrate completely failed to
20 properly analyse and evaluate the evidence on record thereby occasioning a miscarriage of justice.

2) The learned trial Magistrate erred in law and fact in holding that the late Azumanfensi Kakanu purchased the suit land for the exclusive use and occupation by his late sister Mary Kiiza without evidence, and failed to determine ownership of the suit land.

Both parties were represented by Counsel - Mr. Shaban Muziransa for the Appellants and Mr. Evans Tusiime for the Respondents. Both Counsel filed written submissions.

It was submitted for the Appellants that the oral testimony of the Appellants was very credible and this was backed by documentary evidence to wit the purchase agreement and to which the Respondents' mother was a witness.

The three witnesses included PW1 the wife of the late Kakanu who testified that the late Kakanu only allowed his sister Mary Kiiza to stay on the suit land when she separated with her husband. That later

Kakanu told the said Mary to leave the land but he died before she could leave it and this was in 1978.

That this evidence was corroborated by PW2 and
5 PW3 who went further to state that when she died,
Mary Kiiza was buried at Bugembe and not on the
suit land.

That in 1968 Kakanu processed a Lease of the suit
10 land and that the said Lease is on record. If he had
donated the land to Mary then he would not have
taken out a Lease in his own names.

It is submitted that on the contrary the evidence of
15 the Respondents is not credible since by the time the
alleged donation was made, all of them were very
young aged 0 - 8 years. Their evidence is
accordingly hearsay.

20 Further that there is no concrete evidence of the
alleged donation. That there are varying factors to
the allegation of the land being a gift *inter vivos* to
the Respondents' mother.

- a) The Lease of 1968 in Kakanu's names.
- b) The directive by Kakanu to the sister to leave the land.
- c) All defence evidence was that of one family with no independent evidence. That all of them are beneficiaries and therefore had reason to lie.

For the Respondent, it has been submitted that the Respondents' mother Mary Kiiza was the owner of Plot 42 Kamuli Road, having received it from her brother as a gift *inter vivos*. That she occupied it from 1965 until her death in 1989.

It is conceded that Kakanu bought the suit land in 1965. He died intestate in 1978. After the death of Kakanu she continued using the land and when she died her children continued thereon until 2009 when they were sued.

It is submitted that there was no leasehold Certificate ever granted and hence it cannot be used as evidence.

The evidence of PW3 that Kiiza was ordered off the land was contradictory since the same witness testified that Kiiza never left the suit land and died thereon.

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Further that Kiiza and her family have been on the land for 44 years and nothing was done by the family of Kakanu in respect of the suit land.

10 Finally that the Appellants acquiesced in the ownership by the Respondents and their mother assuming they had a right especially as the suit land was given to the Respondents' mother by Bosco Kakanu. That the Appellants waived that right if at
15 all. That if the family knew the Plot was theirs, they should have sought to recover the same in 1978 when Kakanu died, or in 1989 when Mary Kiiza died.

It is submitted that the Magistrate was alive to the
20 principles of acquiescence and waiver when he dismissed the suit.

A look at the record of the lower Court reveals that the issues for trial were:

1. Whether the suit land was donated to Mary Kiiza.
- 5 2. Whether the Defendants are bona fide occupants of the suit land.
3. Remedies available.

10 The trial Magistrate's conclusion was that based on all the available evidence, the conduct of the late Kakanu in leaving Mary Kiiza on the land without disturbance and her continued occupation until her death and her family continuing thereon leads to the
15 conclusion that the late Kakanu had indeed donated the land to the late Mary Kiiza.

He considered the fact of the lethargy on part of the Appellants and their father and not raising the issues
20 when both brother and sister were alive.

That the Plaintiffs were aware of the donation, and although the land was purchased by the Plaintiff's

father, they could not question the Defendants continued occupation and use thereof even after the death of their mother.

- 5 In dismissing the claim, he observed that the other two issues were rendered irrelevant as a result.

A perusal of the proceedings reveals that both the sale agreement and the purported Lease were not
10 tendered as Exhibits, since there was no dispute that the land was bought by Kakanu. Both documents are Annextures to the Plaint though.

Secondly apart from PW1 - the wife of the late
15 Kakanu who at the time of trial was 70 years, none of the witnesses on both sides was of majority age in 1965 all of them being below 10 years or not born. Their evidence is therefore suspect if not hearsay.

20 Thirdly, the alleged Lease document (not tendered but annexed to the Plaint) is just a photocopy. Nobody bothered to produce the original.

Fourthly, there is no evidence that the said Kakanu was planning to develop the land. It is only PW1 who stated so and there is no documentary evidence to support the claim. The said Lease document on a
5 closer look reveals that it was supposed to be a yearly lease with a fee (rental) of Shs.10/= per year to the controlling authority. There is no evidence that this arrangement if it existed continued in the absence of evidence of the continued payment of the
10 rentals.

All the above, coupled with the conduct of the late Kakanu in letting the mother of the Respondents and family continue occupying the land without
15 disturbance gives credence to the Magistrate's conclusions that Kakanu had given the suit land to his sister.

The Respondents have been on the land for 40 years
20 plus and no one took any action adverse to their occupation.

It has been submitted for the Respondents that the Appellants acquiesced and waived their interest if at all and that the Respondents thereby gained ownership by the said acquiescence.

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The Magistrate in his findings did wonder how the Defendants' mother and her family could have continued occupying the land for 40 years plus if the Plaintiffs' father had not ceded his interest therein to
10 his sister.

If as it is submitted for the Appellants that their said father's ownership was not extinguished, then he by his conduct and that of his successors was guilty of
15 acquiescence and or laches.

Acquiescence is an equitable doctrine developed by the Courts to temper the rigidity of the law. Acquiescence will as such destroy the former owner's
20 right/remedy. Laches is another equitable doctrine. It is a defence to enforce equitable rights. It means unreasonable delay in asserting or enforcing a right. Equity aids the vigilant and not the indolent. Ref:

Henry Wabui & another Vrs. Rogers Hanns Kiyonga Ddungu and 2 others - High Court Civil Suit 102/2009. The above suit was rejected on ground of limitation. The above equitable doctrines
5 were also discussed. The Plaintiff had sought to evict the Defendants who were bona fide purchasers for value after a period of 25 years.

In **James Semusambwa Vrs. Rebecca Mulira -**
10 **Civil Appeal 1/1999**, the equitable doctrines were also discussed and the general and agreed principle is that equity aids the vigilant.

It is the finding of this Court therefore that the
15 Appellants failed to prove their claims/interests before the trial Court in view of the principles discussed above and the circumstances of the case.

The trial Magistrate was accordingly correct to decide
20 as he did. In so doing he determined the ownership of the suit land. Both grounds of appeal accordingly fail.

The Appeal is dismissed and the Judgment and Orders of the trial Magistrate are upheld.

The Appellants will meet the costs of the Appeal.

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Godfrey Namundi

JUDGE

26/05/2015

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26/5/2015:

Muziransa Shaban for Appellant

Both parties present

5 Court: Judgment read.

Godfrey Namundi

JUDGE

10 **26/05/2015**